Supreme Court, U.S.
FILED
MAR 9 1988
JOSEPH F. SPANIOL,
CLERK

No. 87-902

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

BETHEL BAPTIST CHURCH, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS

William Bentley Ball
Counsel of Record
Philip J. Murren
Michael Cherewka
BALL, SKELLY, MURREN & CONNELL
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731
Counsel for Petitioners

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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1. The Government misrepresents the burden of the tax herein by saying that the burden imposed on the taxpayer in *United States v. Lee*, 455 U.S. 252 (1982) was "identical" with the burden imposed "upon a religious institution like a church." (Brief In Opposition, 6). While, as petitioners have pointed out (Petition, 10), the religious rootedness of the claim of the secular businessman in *Lee* was more assumed than proved, it begs belief to assert that the burden upon religion through the taxing of *churches* (*i.e.* the demonstrable and direct hardships and loss of capacity imposed upon their congregations and of the various religious activities which are their ministries) is "identical" to the burden upon religion through the taxing of a for-profit commercial enterprise producing and selling finished lumber.

2. The Government's attempt to distinguish *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), rests upon a misunderstanding of the facts of the present case and of the facts and *ratio decidendi* in *Murdock*. *Murdock* did *not* involve "a tax specifically aimed at the protected practice of preaching." (Brief In Opposition, 7, n.4). It was instead a general tax on all persons canvassing or soliciting. (*Murdock*, *supra*, at 106). It was held unconstitutional because of its effect on religious exercise. The tax here is a specific *excise* tax on "the right to employ" (*United States v. Glenn L. Martin Co.*, 308 U.S. 62, 65 (1939)). The

Church's employments are the ministries by which it exists. The tax here, like the tax in *Murdock*, directly burdens the religious exercise of carrying out a ministry. It is irrelevant to say, as does the Government, that the financial effect of the social security tax is "no greater than the burden imposed on all employers." (Brief In Opposition, 7, n.4). Due to the Free Exercise Clause, direct taxation of a church, by reason of the exercise of its religion, is not comparable to the taxation of secular entities.

3. The Government's assertion that the Church could have "elected not to be subject to the employer tax at all" and "chose not to do so" (*id.* at 7) is transparently false. The record establishes precisely the contrary. The Church had *no* choice, as Paragraphs 16 through 25 of the uncontradicted Harris affidavit (Petition, 54a-58a) so clearly show. That is an unalterable, central "given" in this case (*Bethel Baptist Church v. United States*, 629 F.Supp. 1073, 1080-1081 (M.D.Pa. 1986)),* and to argue as though it were not is simply to argue a case not before this Court.

4. The Government is incorrect in asserting that the Church's objection to the tax arises "simply because of a religiously based objection to the use to which the funds may be put by the government." (Brief In Opposition, 7). The Church has not objected to the *use* to which the tax exactions would be put (support of the social security program), but to the exaction itself, whose primary adverse effect is devastating injury to its ministry. The Church employee's obligation to pay the "Self Employment" tax (which would result if the church had chosen "Exemption") is not comparable to his or her obligation to pay income tax. The income tax does not single out church employees for special, highly discriminatory treatment. But the peculiar "Self Employment" tax (26 U.S.C. §1402(j)), falsely classifies and specially burdens one employed by a church by doubling his tax rate and denying him deductions against gross income —

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*The Government is less than accurate when it characterizes the Church as merely "morally obligated" to raise salaries. *Financial necessity*, as well as moral obligation, made this mandatory. See Harris affidavit, Petition, 54a-58a.

solely because he chooses to work for his church. That imposition, enacted after *Lee*, has yet to be addressed in terms of the constitutional objections raised here.

5. The Brief In Opposition avoids the opening question presented by petitioners: whether the Free Exercise Clause "bars the *taxation* of the *religious activity* of *churches*." The Government attempts to shift the Court's focus away from those three dominant themes of this litigation by making the question appear to be one pertaining merely to employee participation in the social security system. That reconstruction of what is at stake in this case veils the major importance of this first-ever federal tax on religious exercise.

In light of the failure of the Government to come to grips with the issues raised in the Petition, and of its gross distortion of *United States v. Lee*, plenary review is essential.

March 8, 1988

Respectfully submitted,

William Bentley Ball
Counsel of Record

Philip J. Murren
Michael Cherewka

BALL, SKELLY, MURREN & CONNELL
511 North Second Street
P.O. Box 1108
Harrisburg, PA 17108
(717) 232-8731
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